IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TIMOTHY S. HINKLEDIRE and NATHANIEL MARSHALL,
Plaintiffs
v.
FREDERICK FRANK, et al.,
Defendants

Civil Action No. 95-286J

MEMORANDUM ORDER

This matter was referred to Magistrate Judge Keith A. Pesto for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C.§ 636(b)(1), and subsections 3 and 4 of Local Rule 72.1 for Magistrate Judges.

The Magistrate Judge filed a Report and Recommendation on December 18, 1995, docket no. 8, recommending that the complaint be dismissed as frivolous pursuant to 28 U.S.C.§ 1915(d). The plaintiffs were notified that pursuant to 28 U.S.C.§ 636(b)(1), they had ten days to serve and file written objections to the Report and Recommendation. No objections have been submitted, and the time for doing so has expired.

After de novo review of the record of this matter, together with the Report and Recommendation, and noting the lack of objections thereto, the following order is entered:

AND NOW, this 9th day of January, 1996, it is

ORDERED that the plaintiffs' complaint is dismissed. The Report and Recommendation is adopted as the opinion of the Court. The Clerk shall mark this matter closed.

BY THE COURT:

D. BROOKS SMITH,
UNITED STATES DISTRICT JUDGE

cc:

Timothy S. Hinkledire BP-0631
S.C.I. Cresson
P.O. Box A
Cresson, PA 16630-0999

Nathaniel Marshall CM-5199
S.C.I. Cresson
P.O. Box A
Cresson, PA 16630-0999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TIMOTHY S. HINKLEDIRE and NATHANIEL MARSHALL, Plaintiffs	:	
v.	:	Civil Action No. 95-286J
FREDERICK FRANK, et al., Defendants	:	

Report and Recommendation

Plaintiffs are incarcerated at S.C.I. Cresson. They have filed a civil rights complaint against the warden, twenty-five members of the prison staff, and personnel in the Pennsylvania Attorney General's office because of their frustration at not being allowed to cell together[1], and at having unspecified members of the prison staff use racial slurs toward them[2]. I recommend that the complaint be dismissed as frivolous pursuant to 28 U.S.C.§ 1915(d) because it has no basis in law.

Plaintiffs assert that they have a state created liberty interest in celling with whomever they wish, which the state should not be allowed to "take[] away without some illegal act on the plaintiffs' behalf." This assertion is ridiculous: a prison is not a hotel. Even if there were some state created liberty interest as plaintiffs assert, it is the substantive decision to separate

---

1. Plaintiffs were previously allowed to cell together, but according to the complaint they are currently not being allowed to cell together in an attempt to get one or both of them to become an informant for the Attorney General's office.

2. One plaintiff is black and one is white; they allege that they have been called "nigger" and "nigger lover." Any interest that may be affected by these statements is protected under state law. See Paul v. Davis, 424 U.S. 693 (1976); see also Siegert v. Gilley, 114 L.Ed.2d 277, 288 (1991)("[S]o long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law, but it is not recoverable in a [civil rights] action.")

them to which plaintiffs object, not the process by which it was reached, and that hypothetical violation of state law is not a basis for a federal civil rights claim.

Plaintiffs' assertion that one of the defendants expressed hostility to celling them together because one of the plaintiffs was black and one white does not breathe life into their claim to dictate cell assignments, either. Automatic, blanket racial segregation of a prison system is of course unconstitutional, see Lee v. Washington, 390 U.S. 333 (1968) (per curiam)[3], but plaintiffs allege that they are being separated to

---

3. Even after Lee v. Washington, not all deliberate racially based cell assignments would violate the Fourteenth Amendment because prison authorities have the right to take into account racial tensions in particularized circumstances. Id. at 334 (concurring opinion). One of those circumstances is the "safety of the institution's guards and inmates [which] is perhaps the most fundamental responsibility of the prison administration." Hewitt v. Helms, 459 U.S. 460, 473 (1983). Prisons are not melting pots of social harmony: prisons are places where persons who are demonstrably unwilling to live in even minimal conformity to society's requirements are confined for extended periods of time. Intra-prison assaults between members of different religious sects and racial groups are matters of judicial notice. See e.g. Dawson v. Delaware, 117 L.Ed 2d 309, 321 (Thomas, J., dissenting); David K. v. Lane, 839 F.2d 1265, 1278-80 (Easterbrook, J., concurring). As a result, prison administrative decisions which seriously intrude on core constitutional rights such as equal protection of law, free speech and free exercise of religion are permissible so long as they are rationally related to a legitimate penological interest. Turner v. Safley, 482 U.S. 78, 89 (1987); O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987). Only ignorance and a naivety passing over into irresponsibility would permit conjecture that racial tension does not currently constitute a major problem in prisons. The most obvious danger spot for prison order and safety is when prisoners are in cells together. It might be thought, as the Seventh Circuit has, see Harris v. Greer, 750 F.2d 617 (7th Cir.1984), that when race is alleged to be somewhere in the picture prison officials must deny or give an account of their rationale for a cell assignment. This would invite a federal lawsuit every time cell assignments are changed.

coerce one or both of them to become an informant. That is not racial segregation.

Pursuant to 28 U.S.C.§ 636(b)(1), the parties are given notice that they have ten days to serve and file written objections to this Report and Recommendation.

DATE: 18 December 95

Keith A. Pesto
United States Magistrate Judge

cc:

Timothy S. Hinkledire BP-0631
S.C.I. Cresson
P.O. Box A
Cresson, PA 16630-0999

Nathaniel Marshall CM-5199
S.C.I. Cresson
P.O. Box A
Cresson, PA 16630-0999